

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1927.

No. 4586.

408

HARRY B. ROSE, APPELLANT,

vs.

THE WASHINGTON TIMES COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED APRIL 11, 1927.

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Court of Appeals of the District of Columbia

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HARRY B. ROSE, APPELLANT,

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
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Court of Appeals of the District of Columbia

No. 4586.

HARRY B. ROSE, Appellant,

vs.

THE WASHINGTON TIMES COMPANY.

a Supreme Court of the District of Columbia.

At Law.

No. 72190.

HARRY B. ROSE, Plaintiff,

vs.

THE WASHINGTON TIMES COMPANY, Defendant.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, towit:

Declaration.

Filed October 25, 1926.

In the Supreme Court of the District of Columbia.

At Law.

No. 72190.

HARRY B. ROSE, Plaintiff,

vs.

THE WASHINGTON TIMES COMPANY, Defendant.

The plaintiff, Harry B. Rose, sues the defendant, The Washington Times Company, a body corporate, for that the defendant did heretofore to wit in the month of July, 1924, on or about the 18th day of said month falsely and maliciously compose and publish of and concerning the plaintiff in said newspaper published by the defendant in the District of Columbia, to wit, The Washington Times, which said newspaper then had a large circulation throughout the District of Columbia and the various states of the union, and in foreign countries, the following false, scandalous, defamatory, and malicious libel, to wit:

Appearing on first page of said newspaper the following:

“12 Barrels of ‘Corn’ Netted in Rum Raid.

“Owner of Shop is Being Held.

“Man Mends Corsets as Rum

Raiders Wait for

Warrant.

“Needing a new tire, Private Alex Friedberg, of the Fourth precinct station, nosed about the Ramsdell Tire Company, 1802 Fourteenth street northwest, today.

“His nostrils suddenly caught an unmistakable odor. Immediately losing his interest in the tire market,
2 he excused himself from the young salesman who waited on him with a remark about rubber being too high priced.

“Returns to Raid.

“A few hours later this afternoon Friedberg came back for the tire—together with a raiding party of policemen and revenue agents under the direction of Captain Robert E. Doyle, of the Eighth precinct, and Inspector W. H. Harrison, who rolled twelve barrels of alleged corn whiskey out of the rear of the tire shop. Several hundred onlookers jammed the alley and interestedly followed the proceedings.

“Each of the barrels, police say, contains fifty-two gallons of liquor, making 624 gallons in all, worth, at the current ‘corn quotation’ exactly \$3,744.

“Investigation showed the reason that Friedberg was able to smell the corn whiskey was because one barrel had a plug out of the side.

“To the casual observer the barrels were nothing but a huge pile of tires as they were completely covered by this means of camouflage.

“Harry B. Rose, proprietor of the tire shop, was arrested on a warrant charging him with illegal possession.

“Pending the arrival of the squad of police and revenue men who had gone to the office of Commissioner George H. Macdonald, Rose was ‘technically’ under arrest.

“Repairs Corset.

“While Mr. Rose, who disclaims knowledge of the presence of the barrels of liquor in his store, was under the guardianship of Lieutenant J. A. Sullivan, of the Eighth precinct, he calmly sat at his desk repairing a Madame X corset.

3 “Mr. Rose good-naturedly chatted with Lieutenant Sullivan, telling the history of the big success of Madame X corsets and how it is easy to repair them due to the fact that they need practically the same treatment as an inner tube of a tire.

“Mr. Rose gave the police the name of a man, said to live near Eckington, to whom the liquor may belong. Mr. Rose said: ‘He is the only man I know of who would have nerve enough to do anything like this.’

“Shipped It In, He Says.

“The proprietor told the raiding officers that he was frequently out of the shop and that the barrels must have been brought in yesterday and the wool pulled over the eyes of the four young men who have charge of his repair shop and were the only ones in the store.

“One of the revenue men said they got a tip that the liquor was com—

And continuing on the second page of said newspaper as follows:

“Tire Man Mends Corset as Rum Raiders Await Warrant.

“Disclaims Whiskey Found.

ing to the Fourteenth street place from Baltimore and that they had been on the lookout for it.

“Those who participated in the raid included Revenue Agent Rose and Policemen C. H. Trammall, together with those already mentioned.”

That in addition to the above, a photograph was printed on the first page of said newspaper in connection with the false, scandalous, defamatory and malicious libel hereinabove set forth showing several men grouped around several barrels, and the following inscription appeared immediately above and in connection with said photograph:

4

“Raiding Party with Rum.”

Immediately below and in connection with said photograph the following printed matter appeared:

“Yo, Ho, Ho, and twelve barrels of corn whiskey. Members of the raiding party who confiscated the liquor in the rear of the Ramsdell Tire Shop, 1802 Fourteenth street northwest, and arrested Harry B. Rose, proprietor, this afternoon: Capt. Robert E. Doyle, of the Eighth precinct Station; Policeman Alex Friedberg, Lieut. J. A. Sullivan, Revenue Agent Rose, and Policeman C. H. Trammell and H. W. Smith.”

And the plaintiff says that the statement and charges contained in said publication against him, and the allegations and inferences therein set forth that the plaintiff was a "bootlegger," or personally engaged in the illegal possession or trading and dealing with intoxicating liquors in violation of the National Prohibition Act, and that the circumstances therein set forth as tending to create or justify such suspicion against him had any existence in fact, and every and all statements or inferences contained therein of unlawful dealing with or possession of intoxicating liquors and improper conduct on the part of the plaintiff are absolutely and wholly false; that he, said plaintiff, is not in anywise guilty of the said offenses so laid to his charge or sought to be imputed to him in and by said false, scandalous, and defamatory publication; and that the said libel, by reason of its said publication in the said newspaper was circulated and published widely throughout the District of Columbia, and the various states of the Union, and in foreign countries, and that by reason of said publication plaintiff has been greatly damaged and injured in his good name, fame, and reputation, and has been brought into disgrace and disrepute among diverse neighbors, friends, business customers, and other persons, and before

5 the public generally, and has been greatly injured in his business and occupation as a manufacturer, merchant, and salesman, and his ability to earn his livelihood and acquire his customary profits and earnings has therefore been greatly impaired, and that by reason of the commission of the grievance aforesaid, diverse good and worthy citizens have suspected and believed, and still do suspect and believe the plaintiff to have been guilty of engaging in the business of unlawful trading in, storage, and possession of intoxicating liquors, and to have been guilty of the bad and improper conduct so published of and concerning him, and have, by reason thereof since wholly refused to have any transaction, acquaintance, or business relation with the plaintiff, as they otherwise would have had, to his great damage.

That on or about the day and year aforesaid, the plaintiff herein was placed under arrest by the Police Officials of the District of Columbia under charges of violating the National Prohibition Act and immediately thereafter was re-

leased on bond, and remained under said bond continuously from to wit the 18th day of July, 1924, until on or about the 1st day of December, 1925, at which time plaintiff was wholly absolved of any and all of the charges then pending against him, and the United States District Attorney for the District of Columbia entered a nolle prosequi of said charges against plaintiff and immediately thereafter plaintiff's bond was discharged and he was granted his full freedom.

Wherefore the plaintiff brings this suit for Fifty Thousand Dollars (\$50,000.00), besides costs.

W. CAMERON BURTON,
Attorney for Plaintiff.

6

Pleas.

Filed November 15, 1926.

* * * * *

Now comes the defendant, by its attorney, and for pleas to the declaration filed in the above entitled cause, says:

(1) That the cause of action sued upon herein accrued more than one year from the commencement of this suit, namely, on, to-wit, the 18th day of July, 1924, and is barred by the statute of limitations.

(2) It admits that on or about the 18th day of July, 1924, it published the article therein referred to and quoted, and that it was the publisher of a newspaper known as the "Washington Times." It further admits that on the 18th day of July, 1924, the plaintiff was placed under arrest by the police officials of the District of Columbia on charges of violating the National Prohibition Act and was thereafter released on bond. It is not advised as to the outcome of the said arrest and if the allegations in respect thereto are deemed material calls for strict proof. It denies each and every of the remaining allegations of the said declaration and says that there was found in and upon the premises referred to in the article complained of a liquid believed to be whiskey and in the manner substantially set forth in said article; that as a result thereof the plaintiff was arrested as set forth in the said declaration and that it published the said article which is substantially true in good faith and

without any malice or ill will toward the plaintiff. And this defendant further specifically denies that the statement and charges contained in said article and the allegations and inferences therein, set forth that the plaintiff was a "boot-legger" or personally engaged in the illegal possession or trading and dealing with intoxicating liquors in violation of the National Prohibition Act.

WILTON J. LAMBERT,
Attorney for Defendant.

Replication.

Filed November 20, 1926.

* * * * *

Comes now the plaintiff and for replication to the first plea of the defendant filed in the above-entitled cause, says:

That the plaintiff was under a disability to bring his cause of action from the time of its accrual until, to-wit, the first day of December, 1925, by reason of the fact that he was placed under arrest by the Police Officials of the District of Columbia under charges of violating the National Prohibition Act and that he was placed under bond and held to bail and that he remained under said bond continuously from the 18th day of July, 1924, until, to-wit, the first day of December, 1925, at which time the United States Attorney for the District of Columbia entered a nolle prosequi of said charges against the plaintiff and immediately thereafter plaintiff's bail and bond were discharged.

W. CAMERON BURTON,
Attorney for Plaintiff.

Demurrer to Replication.

Filed November 30, 1926.

* * * * *

The defendant says that the plaintiff's replication is bad in substance.

WILTON J. LAMBERT,
Attorney for Defendant.

8 Among the points of law to be argued upon the foregoing demurrer are the following:

(1) That the said replication does not set forth facts which if true amount to a disability removing the operation of the statute of limitations against the cause of action sued on herein.

To Mr. W. Cameron Burton,
Attorney for Plaintiff:

Please take notice that the foregoing will be for hearing on the 3rd day of December, 1926.

WILTON J. LAMBERT,
Attorney for Defendant.

Service of copy of foregoing acknowledged this 29th day of November, 1926.

W. CAMERON BURTON,
Attorney for Plaintiff.

Supreme Court of the District of Columbia.

Friday, December 10th, 1926.

Session resumed pursuant to adjournment, Mr. Justice Siddons, presiding.

* * * * *

Upon consideration of the demurrer of the defendant filed herein to the replication of the plaintiff, it is ordered that said demurrer be, and the same is hereby sustained, and thereupon, the plaintiff electing to stand upon the pleadings as filed herein, it is further ordered that this said cause be, and the same is hereby dismissed.

Whereupon it is considered that plaintiff take nothing by this action, that defendant go hence without day, be for nothing held, and recover of plaintiff its costs of defense to be taxed by the Clerk and have execution thereof.

9 From the foregoing judgment the plaintiff notes in open Court an appeal to the Court of Appeals: whereupon the maximum of an undertaking for costs is hereby fixed in the sum of One Hundred Dollars with leave to deposit the sum of Fifty Dollars in lieu thereof.

Memorandum.

December 23, 1926.—Undertaking on appeal approved and filed.

Assignment of Errors.

Filed January 5, 1927.

* * * * *

The plaintiff, Harry B. Rose, is advised and so states for assignment of errors, as follows:

1. That the Court erred in sustaining the demurrer to the replication.

2. That the Court erred in holding that a person who has given bail is not imprisoned within the meaning of the saving clause of the Statute of Limitations.

3. The Court erred in holding that the word "imprisoned" as used in Section 1265 of the Code of Laws of the District of Columbia, means actually, physically confined or incarcerated, and that this is not the status of one in the custody of his bail.

4. That the judgment entered herein is contrary to law.

W. CAMERON BURTON,
GEORGE R. SHERRIFF,

Attorneys for Plaintiff.

Received copy of the above designation of record this 5th day of January, 1927.

WILTON J. LAMBERT,

Attorney for Defendant.

10

Designation of Record.

Filed January 5, 1927.

* * * * *

The plaintiff having perfected an appeal herein to the Court of Appeals of the District of Columbia on the 23 day of December, 1926, hereby requests the Clerk of the Supreme Court of the District of Columbia to prepare, at plaintiff's expense, a transcript of the record on appeal including therein the following papers and proceedings, to wit:

1. Declaration,
2. Pleas,
3. Replication,
4. Demurrer to replication,
5. Memorandum, Demurrer sustained,
6. Judgment,
7. Memorandum of Appeal bond,
8. Assignment of errors,

together with a copy of this designation.

W. CAMERON BURTON,
GEORGE R. SHERRIFF,
Attorneys for Plaintiff.

Received copy of the above designation of record this 5th day of January, 1927.

WILTON J. LAMBERT,
Attorney for Defendant.

11 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 10, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of transcript, in cause No. 72190 at Law, wherein Harry B. Rose is Plaintiff and The Washington Times Company is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 31st day of March, 1927.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 4586. Harry B. Rose, appellant, vs. The Washington Times Company. Court of Appeals, District of Columbia. Filed Apr. 11, 1927. Henry W. Hodges, Clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP 30 1927

IN THE

Henry M. Hodges
 Clerk

Court of Appeals, District of Columbia

APRIL TERM, 1927.

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No. 4586
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HARRY B. ROSE, APPELLANT,

vs.

THE WASHINGTON TIMES COMPANY, APPELLEE.

—
APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA
—

W. CAMERON BURTON,
GEORGE R. SHERRIFF,
Attorneys for Appellant.

IN THE
Court of Appeals, District of Columbia

APRIL TERM, 1927.

No. 4586

HARRY B. ROSE, APPELLANT,

vs.

THE WASHINGTON TIMES COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA

STATEMENT OF THE CASE

This is an appeal from a judgment for appellee dismissing the cause after sustaining a demurrer of the appellee to the replication of the appellant.

The appellant, as plaintiff in the court below, filed a declaration against appellee, as defendant, for damages resulting from a libelous publication appearing in the newspaper owned and published by appellee, said libelous publication appearing on or about the

18th day of July, A. D. 1924. Appellant's declaration was filed October 25, 1926. Appellee filed a plea alleging the fact to be that the cause of action accrued more than one year before the commencement of suit and was therefore barred by the statute of limitations. Appellant filed a replication setting forth the fact to be that appellant was under a disability to bring his cause of action from July 18, 1924, to December 1, 1925, by reason of the fact that he was arrested by the Police Officials of the District of Columbia, held to bail and placed under bond for the entire period above mentioned and, at the expiration of the said period, released and discharged, a nolle prosequi of the charges brought against him having been entered. Appellee filed a demurrer to the replication, which demurrer was sustained, and appellant electing to stand on the demurrer, judgment dismissing the case was entered.

ASSIGNMENT OF ERRORS

1. That the Court erred in sustaining the demurrel to the replication.

2. That the Court erred in holding that a person who has given bail is not imprisoned within the meaning of the saving clause of the Statute of Limitations.

3. The Court erred in holding that the word "imprisoned" as used in Section 1265 of the Code of Laws of the District of Columbia, means actually, physically confined or incarcerated, and that this is not the status of one in the custody of his bail.

4. That the judgment entered herein is contrary to law.

ARGUMENT

The sole question for decision in this case is whether or not a person who has given bail for his appearance at a criminal trial is imprisoned within the meaning of the saving clause of Section 1265 of the Code of Laws of the District of Columbia, which reads in part as follows: “* * * That if any person entitled to maintain any of the actions aforesaid shall be, at the time of the accruing of such right of action * * * imprisoned, such person or his proper representative shall be at liberty to bring such action within the respective times in this section limited after the removal of such disability * * *.” A person so deprived of liberty is under a disability as will be seen by the development of the following propositions:

I. A PERSON BAILED IS IN THE CUSTODY OF THE BAIL. “Upon admission to bail the accused is regarded as in the custody of his bail from the moment a bond or recognizance is executed until he is discharged or recommitted.” 6 C. J. 952, Sec. 166. Petersdorff on Bail at page 405 says, “As the principal is always considered to be in the actual or potential custody of the bail, who are, in contemplation of law, his gaolers, they may at any time during the continuance of their liability seize and render him in their discharge.” This has been recognized by the very early cases as readily appears by 1 Hale 325, which says: “Yet the law is all one if he be under bail, for he is in custodia still, for the bail are, in law, his keepers.” To the same effect are *State vs. Hyde*, 136 S. W. 316, *State vs. Handy*, 116 N. W. 599, and *U. S. vs. Lee*, 170 Fed. 613. In the last mentioned case the court said, “In the theory of the law, by a recognizance of bail in a criminal action, the accused is committed to the

custody of the sureties as to jailors of his own choosing, and is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court, and are bound, at their peril, to see that he obeys the court's order." This view of the law is also to be found in the following cases:

Taylor vs. Taintor, 16 Wall. 366.

Savannah Guano Co. vs. Stubbs 75 S. E. 433.

Levy vs. Arnsthall, 10 Grattan (51 Va.) 641.

II. CUSTODY IS SYNONYMOUS WITH IMPRISONMENT. "The term (custody) in criminal law is the same thing as detention in civil law, and is synonymous with imprisonment, meaning the detention of a person contrary to his will, in actual confinement or the present means of enforcing it." 17 C. J. 441. Levy vs. Arnsthall, *infra*. This rule was early recognized. Hawkins in Pleas of the Crown, Volume II. 8th Edition, page 138, has said, "A man's bail are looked upon as his gaolers of his own choosing, and that the person bailed is in the eye of the law for many purposes, esteemed to be as much in the prison of the court by which he is bailed, as if he were in the custody of the proper gaoler." The extent of the custody is very aptly stated in Taylor vs. Taintor, *infra*. "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original *imprisonment*. Whenever they choose to do so they may seize him and deliver him up in their discharge * * *. They may pursue him into another state, may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose." To the same effect is Everett vs. Holcomb, 58 S. E. 287. (Citing Rapalje and Lawrence Law Dic-

tionary): “ ‘Custody’ in criminal law, is the same thing as ‘detention’ in civil law, and is synonymous with imprisonment.”

In the case of *Levy vs. Arnsthall*, *infra*, the defendant furnished bail in a bail-trover proceeding and filed a petition for a writ of habeas corpus to be released in pursuance of a statute which provided in part that “while a defendant is in custody, whether under an arrest made heretofore or hereafter, the plaintiff * * * may file interrogatories to him, etc. * * * and the Court wherein the case is pending, or a judge etc. * * * may discharge a defendant from custody etc.” The defendant had filed a motion to be discharged under the bail-trover proceedings and that motion became part of the record. The Court said: “The question is, whether Arnsthall, being in the custody of his bail was not in custody under an arrest, in the meaning of that section? I think that he was * * *. A defendant in custody of his bail, is in custody under an arrest; and under the original arrest under the *capias*. The custody is continued from the time of that arrest, and so long as he remains either in close jail, or in the friendly custody of his bail which is substituted therefor.”

In the case of *Savannah etc. vs. Stubbs*, *infra*, which was an action of bail-trover, the defendant was arrested by the sheriff and placed in the custody of a deputy, although not confined to prison, under a statute which provided, in part, “The defendant shall be committed to jail, to be kept in safe and close custody until the said personal property shall be produced etc.” The defendant applied for a discharge upon his own recognizance as permitted by the statute which provided that when a defendant “shall by reason of his inability to give security, be held in imprisonment,

it shall be lawful for him to make his petition etc.” The upper Court held that the defendant was “held in imprisonment” within the meaning of the statute and quoted from Black’s Law Dictionary, page 597, as follows: “It is not a necessary part of the definition that the confinement should be in a place usually appropriated to that purpose; it may be in a locality used only for the specific occasion; or it may take place without actual application of any physical agencies of restraint (such as locks or bars), but by verbal compulsion and display of available force.”

The above two cases are of particular importance because of the fact that the Courts had a question of statutory construction before them. The situation in the case of Savannah etc. vs. Stubbs is practically identical with that of the instant case.

III. THE WORD “IMPRISONED” IN THE STATUTE OF LIMITATIONS IS NOT LIMITED TO PERSONS CONFINED IN JAIL. “Imprisonment is not confined to putting a man in jail.” 31 C. J. 260. U. S. vs. Mitchell, 163 Fed. 1014, states: “Imprisonment, in its general sense is the restraint of one’s liberty.” It is not necessary that a person be incarcerated or confined to a prison in order that he may be imprisoned within the meaning of the Statute of Limitations. Wood on Limitations, Section 241, page 1134, states: “Under the statute of James, the disability arising from imprisonment relates to a restraint of one’s liberty under process or color of law, or an involuntary restraint that prevents the person from fully availing himself of the remedies provided for the enforcement of his legal rights. Thus, in this country it has been held that a person held in slavery is imprisoned, within the meaning of the term

as used in these statutes and that the disability does not cease until he is emancipated.” Wood vs. Ward, Fed. Cases No. 17965. Matilda vs. Crenshaw 12 Tenn. 249.

The appellant in the present case by being placed in the custody of his bail was deprived of the liberty to which he would otherwise have been entitled, and such restraint was suffered under due process of law.

Section 1265 of the Code of Laws of the District of Columbia merely uses the word “imprisoned” without words of qualification, and we therefore must look to cases where the question of what constitutes imprisonment has been decided, including actions brought for false arrest, malicious prosecution and false imprisonment. The rule as to what constitutes imprisonment sufficient to sustain any of the above actions is laid down by this Court in United Cigar Stores vs. Young 36 App. 390, as follows: In Hebrew vs. Pulis, 73 N. J. L. 621 etc., the Court said, ‘The essential thing is the constraint of a person. This constraint may be caused by threat as well as by actual force and the threat may be by conduct or words. If the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand a person may be as effectually restrained and deprived of liberty as of prison bars. Unless it is clear that there is no reasonable apprehension of force, it is a question for the jury whether the submission was a *voluntary* action or brought about by fear that force would be used.’ ” To the same effect is Martin vs. Houch, 171 N. C. 317, and Fotheringham vs. Adams Express Company, 36 Fed. 252. The appellant in the present case had no choice but to submit to a restraint of his liberty, and once in the position of a person bailed, he was at the

mercy of his bailor as will be seen by reference to Taylor vs. Taintor, *infra*. In the case of Martin vs. Houch, *infra*, the Court said, "It is not necessary to constitute false imprisonment that the person restrained of his liberty should be touched or actually arrested. If he is ordered to do or not to do the thing, to move or not to move against his own free will, if it is not left to his option to go or stay where he pleases, and force is offered, or there is reasonable ground to apprehend that coercive measures will be used if he does not yield, the offence is complete upon his submission. A false imprisonment may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or both."

The Statute of Limitations does not contemplate placing under a disability only those persons who are incarcerated in jail. The Statute of Limitations was first enacted into law under the title of 21 James I. in England. This statute was in force in Maryland at the time of the cession to the District of Columbia and was enacted into law by the Maryland legislature under Md. Act. 1715, Chapter 23, Section 3. It became a part of the law of the District of Columbia as Chapter 42, Limitations of Actions, Compiled Statutes of the District of Columbia, Section 7, page 360. From the time the statute was first enacted, during the reign of James I, the word "imprisoned" has been used and there has been no modification in the act, with the exception of some inconsequential changes, from that time to the present, except that a person beyond the seas was previously included in the saving clause. We therefore must look to the conditions as they existed at the time the statute was first enacted because it is evident that so far as the saving clause is concerned no

modification concerning persons imprisoned has been made. Petersdorff On Bail at page 406 says, "and it has been already shown that the statute 5 George II, Chapter 30, Section 5, which confers protection on bankrupts for the space of 42 days after they have been submitted to the commissioners, does not apply to cases where they are in actual custody; and it follows that the bankrupt is not entitled to protection even while under examination before the commissioners against the common-law right of his bail." It seems, therefore, that a person who gave bail was under considerable restraint and this is borne out by Annon. 6 Mod. 231, 87 Reprint 982. "Per curiam. The bail have their prisoner always upon a string, and may pull the string whenever they please, and render him in their discharge; they may take him up even upon Sunday, and confine him until the next day and then return him; for the entry in this country is traditur in ballium, etc., and the doing it on a Sunday is no service of process."

CONCLUSION.

In conclusion then may it be said that the appellant was from the date of the libelous publication continuously in the custody of his bail and therefore imprisoned within the meaning of Section 1265 of the Code of Laws of the District of Columbia until within one year from the date of filing of his cause of action. The cause of action is therefore not barred by the Statute of Limitations and the ruling of the Court below should be reversed.

W. CAMERON BURTON,
 GEORGE R. SHERRIFF,
Attorneys for Appellant.

IN THE
Court of Appeals, District of Columbia

APRIL TERM, 1927.

No. 4586.

HARRY B. ROSE, *Appellant*,
VS.
THE WASHINGTON TIMES COMPANY, *Appellee*.

BRIEF ON BEHALF OF APPELLEE.

WILTON J. LAMBERT,
RUDOLPH H. YEATMAN,
Attorneys for Appellee.

IN THE
Court of Appeals, District of Columbia

APRIL TERM, 1927.

No. 4586.

HARRY B. ROSE, *Appellant*,

VS.

THE WASHINGTON TIMES COMPANY, *Appellee*.

BRIEF ON BEHALF OF APPELLEE.

ARGUMENT.

As stated by appellant in his brief, the sole question presented by the appeal is whether or not a person who has been arrested and admitted to bail is "imprisoned" within the meaning of the word as used in the saving clause of Section 1265 of the Code of Laws of the District of Columbia. The argument of the appellant is divided into three parts intended to be builded each upon the other, and is in effect that because a person is technically in the custody of his bail he is imprisoned within the meaning of that word,

because legal custody, although not actual, is synonymous with imprisonment, and to be imprisoned is not necessarily to be confined in a jail. The whole argument is founded upon a legal fiction rather than upon a practical interpretation of the word "imprisoned."

Under the common law the word "bail" meant the release of a person "from custody upon the undertaking of two or more persons for him, and also upon his own recognizance, that he shall appear to answer the charge against him at the time appointed. It is a delivery or bailment of a person to his sureties, so that he is placed in their friendly custody instead of remaining in prison." (3 R. C. L., 4)

It will be noted that bail effectuates the delivery of a person who is being physically restrained of his liberty by the proper authorities into the "*friendly*" custody of his sureties. (See also 4 Blackstone Comm. 297).

Section 938 of the Code D. C. provides that whenever a person charged with crime is held to bail the court shall have power to allow a deposit with the clerk of money in the amount of the bail instead of requiring a bond or recognizance.

It is thus seen that the common law as enlarged by the Code expressly provides through the medium of bail for the removal of the physical restraint that otherwise would be imposed upon a person charged with crime. Can it be said that in the saving clause of Section 1265 of the Code it was intended that a man who is not so far restrained of his liberty as that he can pursue his lawful occupation and his other activities in life in the same manner as any other citizen

is nevertheless imprisoned, and thereby deprived of the opportunity and privilege of instituting a suit to redress any claimed wrong or injury? When a man is taken into custody on a criminal charge he will be imprisoned until he is released by the proper authorities, unless in the meantime he procures his freedom by guaranteeing his appearance in court whenever demanded by the government, through the medium of bail. When such a release is effected such a man is free to go and come without restraint and to do any and all lawful things that he pleases, subject only to one condition: that he deliver his person to the proper authorities upon demand. It follows that he can pursue his business or employment, bring suits, defend suits, and do every act that a person not similarly situated could do, without hindrance or interference. The authorities cited by the appellant all are to the effect that the alleged custody of the accused by his bail is a legal fiction, although the substantial purpose of furnishing bail is self-evident, namely, to procure the freedom of an accused pending his trial. Suppose that the defendant instead of furnishing a bail bond had availed himself of the provisions of 938 of the Code D. C. and deposited with the clerk of the court money in the amount of the bail, he would still be technically in the custody of the law, and yet, could it be held that he was imprisoned within the meaning of the saving clause of the Statute of Limitations, and thereby not subject to its terms? Yet to so find would be a logical conclusion from the argument of the appellant.

Cases are cited by the appellant to the effect that imprisonment is not necessarily confinement in jail,

but may be brought about by threats, as well as by actual force. These cases, however, are not applicable because the cases themselves contemplate an *actual* rather than fictional restraint of the liberty of the person complaining. The damages claimed in such cases flow from the actual restraint of a person brought about by threats or force. In the case of an accused admitted to bail, the accused is not in fact restrained; the giving of the bail is intended for a contrary purpose, namely, that he be relieved of an existing restraint of his liberty so that he may go about his affairs without interference. The fact that he is by a legal fiction technically in the custody of his bail does not encroach upon that liberty, and until his bail actually takes him into custody and turns him over to the proper authorities, that liberty of action continues. It is for this very purpose of being relieved of imprisonment that persons go to the expense of procuring bail.

We have not been able to find by an examination of the authorities any case where it is sought to have the court hold that a person out of custody on bail is "imprisoned" within the meaning of the saving clause of a Statute of Limitations. As shown by the quotation from Wood on limitations, Section 241, Page 1134, which is the only text in that work treating of this subject, since the birth of the statute under consideration, "the disability arising from imprisonment relates to a *restraint* of one's liberty under process or color of law, or an involuntary *restraint* that prevents the person from *fully availing* himself of remedies provided for the enforcement of his legal rights." (Our italics) This disability has been exemplified only in such cases showing that the person has suffered an

actual restraint of his liberty to such an extent as that he was prevented from availing himself of his legal remedies, such as slavery, arrest and detention by the proper authorities either in criminal or civil cases.

The replication sets forth no facts showing any actual restraint of liberty of action of the defendant. It merely recites that he gave bond for bail which was subsequently discharged. There is nothing in the replication nor in the argument of the appellant which shows that appellant at any time during the period that he was on bail was restrained in any way or in any manner from doing whatever he pleased, nor is there anything shown in the replication from which it may be inferred that there was in fact or in law any restriction imposed upon the plaintiff which could or would have interfered in any way with an attempt upon his part to institute a suit, such as was filed in the court below. Is it claimed that he was prevented from transacting his business? If not, how was he prevented from filing a suit?

In conclusion, we wish to observe that under the authorities, imprisonment can not affect the running of limitations unless the statute itself makes it an exception. That exception should be interpreted in the light of the purposes of same as indicated by the other provisions of the Code. Grouped with that exception are those which are in favor of an infant and a person *non compos mentis*. It is apparent that it was the purpose of the legislation to prevent an injustice being done a person under an actual disability, who has sustained a wrong and is not in a position to seek redress for the same until the removal of the disability.

It is submitted that the court below properly sus-

tain the demurrer to the replication of the plaintiff and that its action in so doing should be affirmed.

Respectfully submitted,

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